

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE RIGOBERTO FRAUSTO-DIAZ,

Defendant.

8:09CR3

MEMORANDUM AND ORDER

This matter is before the court on the movant's (hereinafter, "defendant's") Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody Pursuant to [28 U.S.C. § 2255](#), [Filing No. 286](#), and counsel's motion to withdraw, [Filing No. 290](#). The defendant seeks relief under [Johnson v. United States](#), 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court invalidated the residual clause of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), which defined "violent felony" as a crime that "involves conduct that presents a serious potential risk of physical injury to another" as unconstitutionally vague in violation of due process of law. *Id.* at 2557.

The court has reviewed the record and finds *Johnson* has no application to this case. The defendant was charged with and convicted of conspiracy to distribute 50 grams or more methamphetamine (actual). See [Filing No. 142](#), Judgment. The record reflects that the defendant's sentence was not enhanced under the ACCA, nor did he receive a career offender enhancement under the United States Sentencing Guidelines, [U.S.S.G. § 4B1.1](#). [Filing No. 140](#), Presentence Investigation Report (sealed) at 10. His sentence was based on a plea agreement and drug quantity. See *id.* at 4, 10.

Therefore, the *Johnson* decision is inapplicable here and his claim fails. The court finds it appears plainly from the face of the motion and the record that the defendant is not entitled to relief, and his motion is subject to dismissal under Rule 4(b) of the Rules Governing Section 2255 Proceedings.

Counsel has shown that there are no non-frivolous claims for relief pursuant the *Johnson* decision and the court finds counsel should be allowed to withdraw. Further, there appears to be no need for a hearing and the hearing previously scheduled herein will be cancelled.

The defendant must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. See *Miller-El v. Cockrell*, 537 U.S. 322 (2003). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Moreover, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court finds the defendant's motion does not present questions of substance for appellate review and, therefore, does not make the requisite showing to satisfy § 2253(c). See 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Accordingly, no certificate of appealability pursuant to 28 U.S.C. § 2253(c) will issue. Should the defendant wish to seek further review of his petition, he may request

a certificate of appealability from a judge of the United States Court of Appeals for the Eighth Circuit. See *Tiedman v. Benson*, 122 F.3d 518, 520-22 (8th Cir. 1997).

Accordingly,

IT IS HEREBY ORDERED that:

1. The defendant's motion to vacate, set aside, or correct his sentence ([Filing No. 286](#)) is denied.
2. Counsel's motion to withdraw ([Filing No. 290](#)) is granted.
3. The hearing scheduled for October 3, 2016 at 11:30 a.m. in Courtroom No. 3, Roman L. Hruska U.S. Courthouse, 111 South 18th Plaza, Omaha, NE is cancelled.
4. This action is dismissed.
5. A judgment in conformity with this Memorandum and Order will issue this date.
6. No certificate of appealability pursuant to [28 U.S.C. § 2253\(c\)](#) will issue.

Dated this 5th day of July, 2016.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge